No. 53245-0-II

Court of Appeals, Division II
of the State of Washington

Fort Discovery Corp., a Washington corporation;
Stephen Anderson; **Steven Gilstrom**; and **Jay Towne**,

Appellants,

v.

Jefferson County, a Washington municipality,

Respondent.

On appeal from the Superior Court of Washington

for Clallam County

Cause No. 18-2-01023-05

Appellants' Reply Brief

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Reply Brief succinctly replies to the most salient arguments in Jefferson County's Respondent's Brief and shows:

- The regulation of shooting ranges is the regulation of the "discharge" of firearms under RCW 9.41.290;
- There is no "reasonable likelihood" of bullets from the professional gun ranges at issue here causing jeopardy to humans, domestic animals, and property under RCW 9.41.300(2)(a);
- The police power is not a stand-alone authorization for the Ordinance because statutory compliance (RCW 9.41.290) and state constitutional compliance (Wash. Const. art. I, § 24) are still required for the exercise of the police power, so, given that RCW 9.41.290 and Wash. Const. art. I, § 24 are already separate issues in this appeal, a police power analysis adds nothing;
- Historical evidence of the Second Amendment from the relevant time – 1866 – does not show that gun ranges were regulated;
- Historical evidence of Wash. Const. art. I, § 24 from the relevant time and place – 1889 and Washington State – does not show that gun ranges were regulated;
- The "time, place, and manner" standard of review urged by Jefferson County is for First Amendment claims but is not the proper standard of review under the Second Amendment or Wash. Const. art. I, § 24, both of which instead require intermediate scrutiny;
- Because the Second Amendment is the "federal floor" of protection of individual rights beneath which a state constitutional provision cannot go, and because the Second Amendment requires intermediate scrutiny (or higher), the minimum standard of review under Wash. Const. art. I, § 24 is intermediate scrutiny (or higher);
- "Reasonableness" is not the standard of review for Second Amendment claims and, therefore by extension because of the

"federal floor," not the standard of review under Wash. Const. art. I, § 24; and

- "Stare decisis" does not require the application of the (with all due respect) demonstrably wrong standard of review from *Kitsap Rifle*[1] and *Jorgenson*[2] because the case at bar presents a full historical and *Gunwall*[3] analysis not provided in *Kitsap Rifle* or *Jorgenson*.

II. REPLY TO COUNTERSTATEMENT OF THE CASE

This section replies to the most significant portions of Jefferson County's Counterstatement of the Case.[4] *See* Respondent's Brief at 6-15.

A. The Ordinance Regulates the Federally Recognized *Corresponding* Second Amendment Right of Range Training

Jefferson County asserts that the Ordinance does not regulate the "core" Second Amendment right of home-based self-defense. This is a straw-person argument. Jefferson County is correct that the Ordinance does not strip citizens of their right to own and keep a firearm in their homes – but this is not the issue presented in this appeal or what Appellants have ever argued. Appellants very clearly argued in their Appellants' Opening Brief that the range training right has been recognized by the federal courts as a *corresponding* right to the core right of self-defense. Appellants argued:

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[1] *Kitsap County v. Kitsap Rifle and Revolver Club*, 1 Wn. App. 2d 393, 405 P.3d 1026 (2017), *review denied*, 183 Wn.2d 1008 (2015) ("*Kitsap Rifle*").
[2] *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013).
[3] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).
[4] With a 25-page limit for this Reply Brief, many of the smaller factual and minor legal arguments in Jefferson County's Respondent's Brief are not analyzed here due to space limitations.

> While individual self-defense is the core right protected by the Second Amendment, the range training right is a corresponding right:
>
> > The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.
>
> *Ezell I*, 651 F.3d at 704. *See also Ezell II*, 846 F.3d at 890 ("the Second Amendment protects the right to learn and practice firearm use in the controlled setting of a shooting range.").
>
> That is, a person cannot "bear" arms if they cannot maintain proficiency in their use. This bears (no pun intended) repeating because the Second Amendment range training right comes up so rarely that it is not intuitive: The right to "bear" arms necessarily includes a right to shoot at a range to maintain proficiency in firearms. "Bearing" arms does not just mean owning them; it also means practicing with them. So restricting the right to practice with them is restricting the "bearing" of arms – and the Ordinance restricts the right to practice with arms.

Appellants' Opening Brief at 28 (long-form citations and footnotes omitted).

B. Miscellaneous Arguments Made By Jefferson County

1. Appellants Quoted the Entire Finding of the Errant Bullet Pretext

Jefferson County claims that Appellants omitted a portion of the quotation about the Errant Bullet Pretext. *See* Respondent's Brief at 10-11. Appellants quoted the entire portion of the Errant Bullet Pretext. *See* Appellants' Opening Brief at 16. Then, in another part of the brief – where the emphasis was on a different point – the unemphasized part of the quotation was omitted. *Id*. at 15. In all of Appellants' briefing, Appellants

supplied ellipses whenever a portion of a quote was omitted to show the omission and cited to the record to allow the reader to read the quoted material in full. *Id*.

2. The Errant Bullet Pretext Is Flawed Because All Reported Bullet "Strikes" Were Determined to Be Unfounded

Jefferson County claims that the Board of County Commissioners could have concluded that the Ordinance was necessary because of "10 other reported incidents of gun fire coming from the [Jefferson County Sportsmen's Association] shooting range between 2008 and 2017." Respondent's Brief at 12. A cursory reading of the Sheriff's Office investigation of the "10 other reported incidents" shows that they were unfounded. *See* CP 271-285. The "bullet strikes" never happened and Jefferson County could not rely on them to justify the Ordinance.

III. STANDARD OF REVIEW

Appellants agree with Jefferson County on that the standard of review is de novo and agree that, given the cross-motions for summary judgments, no genuine issues of material facts exist. *See* Respondent's Brief at 15.

IV. ARGUMENT IN REPLY

A. RCW 9.41.290 Pre-Empts the Ordinance Because Regulating Shooting Ranges Is Regulating the "Discharge" of Firearms – That's What People Do at a Shooting Range

1. *Kitsap Rifle* Involved a Different Ordinance and Very Different Facts

Jefferson County refers to the Ordinance at issue, ch. 8.50 Jefferson County Code, as the (lower-case) "ordinance." *See* Respondent's Brief, *passim*. This is significant because Jefferson County starts its section on pre-emption by asserting, "*Kitsap Rifle* held RCW 9.41.290 does not preempt the ordinance." Respondent's Brief at 15. This is half-way correct, but the incorrect second half is important. *Kitsap Rifle* did, indeed, hold that the *Kitsap County* ordinance was not pre-empted. *Kitsap Rifle*, 1 Wn.App.2d at 406-408. However, the second half is incorrect that *Kitsap Rifle* upheld the *Jefferson County* Ordinance at issue.

There are materially significant differences between the two ordinances. *See* Appellants' Opening Brief at 21-22. *Cf*. CP 19-105 (Kitsap ordinance) *with* CP 606-646 (Jefferson ordinance). And there are four reasons why the *Kitsap Rifle* does not control here. *See* Appellants' Opening Brief at 1-2.

2. RCW 9.41.290 Pre-Empts Municipal Regulation of the "Discharge" of Firearms – and That's What Happens on Shooting Ranges

Jefferson County partially quotes and selectively highlights RCW 9.41.290. Jefferson County's Respondent's Brief states (emphasis in original):

> The state of Washington hereby fully occupies and preempts the entire field of ***firearms regulation*** within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components.

Respondent's Brief at 16.

Of course, Jefferson County is pointing to the part of RCW 9.41.290 that best serves its argument, which is perfectly appropriate advocacy. Appellants do the same by highlighting the part of RCW 9.41.290 that best serves their argument:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, ***discharge***, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components.

The fact remains that municipal attempt to regulate the "discharge" of firearms is pre-empted (with one pertinent exception addressed *infra* at 8-11).

Shooting guns at a gun range is the "discharge" of guns. It just is. The purpose of going to a gun range is to discharge it. People "discharge" their guns at a shooting range:

> Shooting is discharging a firearm. The terms are synonymous. When someone says, "I just shot a gun," that's the same as "I just discharged a gun." No one ever says, "I just shot a gun, but it didn't discharge." In fact, the "discharge" of a firearm is the fancy way of saying "shoot."

(CP 821-823).

After discussing the statutory construction principles of plain meaning, ambiguity, and resort to a dictionary (CP 821-822), Appellants also noted that the dictionary definition of "discharge" includes: "to fire or shoot (a firearm or missile): *to discharge a gun*." (CP 823) (emphasis in original quoted citation) (citation omitted). Appellants also noted: "Interestingly, one of the listed synonyms for 'discharge' is 'shooting.' That bears repeating: the dictionary definition of 'discharge' lists 'shooting' as a synonym." *Id*. (citation omitted).

Jefferson County then argues that the Ordinance differentiates between types of people by only regulating owners of shooting facilities, not the individuals shooting there. *See* Respondent's Brief at 18. This distinction is not contemplated by RCW 9.41.290 because the statute regulates *activities* without regard to *who* is doing them. RCW 9.41.290 does not pre-empt municipalities based on *who* is doing something, but rather on the *activities* the municipality is attempting to regulate.

3. RCW 9.41.300(2)(a), the "Reasonable Likelihood" Exception to Pre-Emption, Does Not Apply Here Because of the Word "Reasonable"

Jefferson County argues that the "Reasonable Likelihood" exception to pre-emption in RCW 9.41.300(2)(a) applies and therefore the Ordinance is not pre-empted by RCW 9.41.290. *See* Respondent's Brief at

18-19. The Reasonable Likelihood exception allows a municipality to regulate the discharge of firearms if the regulation is in an area where there is a "reasonable likelihood that humans, domestic animals, or property will be jeopardized." *See* RCW 9.41.300(2)(a).

The Legislature put the word "reasonable" in RCW 9.41.300(2)(a) for a reason. The Legislature has repeatedly recognized that some local governments are a little too zealous to regulate firearms. *See Chan v. City of Seattle*, 164 Wn. App. 549, 551-553, 265 P.3d 169 (2011) (analyzing legislative history of RCW 9.41.290). A "reasonable" likelihood of harm is a higher standard than a "maybe" or "speculative" or "it could theoretically happen" standard. By inserting the word "reasonable" in RCW 9.41.300(2)(a) presumably the Legislature wants to prevent municipalities from inventing completely speculative "harms"; instead, those claimed harms must be "reasonable." *See generally* Appellants' Opening Brief at 23-24 & CP 296-300 (analyzing requirement that potential for harms are "reasonable" not merely speculative).

Jefferson County points to *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 856 P.3d 1113 (1993) for the proposition that RCW 9.41.300(2)(a) gives local governments "unlimited authority" to regulate the discharge of firearms. *See* Respondent's Brief at 19. *Ballsmider* involved a completely different issue than the Ordinance in this case:

whether criminal penalties were greater under state or municipal law. 71 Wn. App. at 161.[5] *Ballsmider* also involved a different part of RCW 9.41.290, the part about uniformity of criminal penalties between state law and local ordinance. 71 Wn. App. at 161. Besides, the *Ballsmider* court could not have really meant that a statute limiting municipal authority to preventing the "reasonable" likelihood of harm was actually the "unlimited authority" to regulate any harm that could be conceived. The word "reasonable" prevents this.

Ballsmider actually helps Appellants' case. In *Ballsmider*, the court focused on the fact that the criminal charge at issue was for discharging a gun in the middle of densely populated Seattle. *Id*. at 160. This led the court to focus on the "area" of a municipality in which firearms discharges could be regulated. *Id*. at 163 (RCW 9.41.300(2)(a) involves local regulation of the "discharge of firearms in *areas* where people, domestic animals, or property would be endangered.") (emphasis added). The site of the proposed Fort Discovery range is the direct opposite of densely populated Seattle. The Fort Discovery site is in the middle of nowhere, with the nearest residence 1.5 miles away and only a

[5] The issue on appeal in *Ballsmider* was "Whether the sentence for violation of the ordinance was in excess of that allowed under state law because it exceeded the maximum sentence available under the State firearms statutes, RCW 9.41[.]" 71 Wn. App. at 161.

handful of people living within a five-mile radius. (CP 177 & 236.) Randomly and wildly shooting guns in the streets of Seattle, a city of several million packed into a few square miles, clearly creates a "reasonable likelihood" of harm as *Ballsmider* recognized – but the exact opposite is true in one of the most remote parts of the state with no residents in a 1.5 mile radius. Bullets on a professional commercial gun range – especially a range operated by an owner with a perfect safety record – do not leave the boundaries of the range. Stray bullets are prevented by berms, firing lanes, and other measures required to obtain the insurance coverage necessary to operate a range. *See* CP 174-175.[6] *See also* CP 272 (Jefferson County Undersheriff concluding, after investigation, that design of the Jefferson County Sportsmen Association

[6] The uncontested facts in the record, which are therefore verities on appeal (*Muridan v. Redl*, 3 Wn. App. 2d 44, 62, 413 P.3d 1072 (2018)), establish:

> Commercial shooting facilities such as the Old Range (and, in the future Fort Discovery's proposed range) are highly controlled by professional range operators, who must carry insurance to operate. Fort Discovery's past insurance policies require numerous safety measures (although fewer than the Ordinance). Fort Discovery will obtain similar, probably identical, insurance for its new facility. The necessity of complying with stringent safety requirements in their insurance policies gives commercial shooting facility operators a strong incentive to run a safe range. For example, shooting lanes are delineated and range safety officers are present. Only members, guests, and members of client organizations may shoot there. Commercial shooting facilities are where serious shooters go. In my 27 years of experience operating a commercial shooting facility, I have concluded that casual, reckless, untrained shooters often go to gravel pits and country roads which have no safety measures in place. Safe shooting happens at commercial shooting facilities. Fort Discovery's track record certainly supports this.

CP 174-175 (Declaration of Joseph N. D'Amico).

rifle range "appears to be constructed sufficiently to prevent" a bullet strike on the neighboring properties). The Fort Discovery range had a perfect 27-year safety record (CP 174-175) and the other range in the County, the Jefferson County Sportsmen's Association, had a perfect 56-year safety record (CP 305), for a combined 83-year perfect safety record. Perfect decades-long safety records and extremely remote locations with almost no people nearby is the exact opposite of a person randomly shooting a gun in the middle of Seattle. *Ballsmider* recognized a city's right to control wild shooting into the air in the middle of Seattle, but this is entirely different than the Fort Discovery scenario.

4. YouTube Videos of People Doing Dumb Things on Other Gun Ranges in Other States Do Not Prove the Ordinance Is Valid

Jefferson County points to some very selectively chosen videos on YouTube of gun safety incidents to attempt to show that the Ordinance is valid. Appellants could have put thousands of hours of YouTube footage of safe shooting at other ranges into the record, but these videos are irrelevant. Appellants have already addressed the YouTube issue in the trial court. *See* CP 322 (emphasis in original):

> The YouTube videos in Jefferson County's Motion for Summary Judgment showing outrageously unsafe behavior at other ranges is not relevant; the track record of the *actual* gun ranges at issue is. This case is not about whether people do dumb things on YouTube; [Appellants] concede that they do. But that has nothing to do with this case. Jefferson County has no video of unsafe

> conditions at the two gun ranges at issue because, as shown below, there have been none in those ranges' combined 83 years of operations.

Remember: the standard is not "maybe it could happen" or "it happened this one time in Florida"; the standard is a "reasonable likelihood" of harm and the record shows a perfect 83-year safety track record with the gun ranges regulated by this Ordinance.

5. The Two Gun Ranges' Past Safety Records Are Relevant

Jefferson County argues that the two ranges' perfect 83-year safety record doesn't matter. *See* Respondent's Brief at 22-23. Appellants are not arguing that the two gun ranges' track records prove that an accident is precluded as a matter of physics because this is not the legal standard. Rather, Appellants are sticking to the language of RCW 9.41.300(2)(a) and laying out an (uncontested) record of why there is no "reasonable" likelihood of such harm. An appellate record showing a perfect 83-track record of the very activity at issue sets this case apart from every other, including *Kitsap Rifle* which had no such record.

Jefferson County argues that the 27-year perfect track record of the now-closed Fort Discovery range is irrelevant. *See* Respondent's Brief at 21-22. The old range was operated by the same owner as the new one will be and was subject to the same insurance-mandated safety requirements as the new one will be. (CP 174-175.) Again, Appellants are not arguing that

Fort Discovery's past 27-year perfect track record proves no accidents are physically possible, just that there is no "reasonable" likelihood of harm. If a municipality can regulate activities subject to a statutory "reasonable likelihood" standard when that activity has an 83-year perfect track record, the word "reasonable" no longer has any meaning. Jefferson County succeeding on its argument would mean that the statutory limitation on harms to "reasonable" ones had been judicially amended into "it could theoretically happen." The "reasonable" requirement should not be stretched so thin, especially given that the Ordinance touches on a constitutional right.

6. The Police Power Is Not a Stand-Alone Authorization for the Ordinance

From discussions with opposing counsel, Appellants' counsel was under the impression that Jefferson County was not arguing on appeal that municipal police powers – standing alone, without regard to statutory authority or the state constitution – authorized the Ordinance. *See* Appellants' Opening Brief at 26 & n. 15.[7] It now appears Jefferson County is making this argument.[8]

[7] Appellants are not accusing Jefferson County of misleading them on this point; it appears to be a miscommunication.

[8] Appellants preserved this issue for appeal by challenging Trail Court Conclusion of Law No. 7. *See* Appellants' Opening Brief at 6 - 7 (Issue 4).

Appellants provided analysis to the trial court of why the police power under Wash. Const. art. XI, § 11 and RCW 36.32.120(7) does not authorize the Ordinance. *See* CP 819-820.[9] The thumbnail sketch of the analysis is that the police power is not a stand-alone power; it can only be exercised if the municipal enactment is not precluded by statute or the state constitution. *See id*. Appellants assert that RCW 9.41.290 precludes the Ordinance by pre-emption (*see* Appellants' Opening Brief at 21-25) and that Wash. Const. art. I, § 24 also precludes it (*see* Appellants' Opening Brief at 34-49).

The Court must already decide both the RCW 9.41.290 and Wash. Const. art. I, § 24 issues because they are separate bases of appeal. The reason the police power is not a stand-alone power is that a decision on the police power necessitates a decision on the already-presented issues of whether RCW 9.41.290 and Wash. Const. art. I, 24 preclude the Ordinance. The decision on these two issues will answer the police power question. So Jefferson County's argument about Wash. Const. XI, § 11

[9] Due to the 25-page limit on reply briefs, Appellants incorporate by reference their trial court briefing at CP 819-820 into this Reply Brief. A brief overview of the argument is that Wash. Const. art. XI, § 11 provides that "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are *not in conflict with general laws*." (emphasis added) and RCW 36.32.120(7) authorizes counties to "[m]ake and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are *not in conflict with state law*." (emphasis added).

and RCW 36.32.120(7) adds nothing to the questions already before the Court.

B. "Time, Place, and Manner" Is Not the Test for the Second Amendment

Jefferson County mentions (but does not analyze or cite authority for) the proposition that reasonable "time, place, and manner" restrictions on shooting are allowed under the Second Amendment. *See* Respondent's Brief at 3 & 23. This is incorrect: "time, place, and manner" is a First Amendment standard that has been analogized – but not applied – to the Second Amendment.[10] "Time, place, and manner" is not the Second Amendment standard – intermediate scrutiny is. *See* Appellants' Opening Brief at 31 & 36.

[10] Perhaps Jefferson County is interpreting *Kitsap Rifle* as holding that *Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011) ("*Ezell I*") established a "time, place, and manner" standard for the Second Amendment. *See* 1 Wn. App. 2d at 415 (*Ezell I* court "distinguished historical statutes that were mere regulatory measures and regulations limiting the time, place and manner of shooting forearms, suggesting that those statutes did not implicate the Second Amendment. *Id*. at [631 F.3d at] 705-06."). *Ezell I* did not do so. Instead, *Ezell I* merely *analogized* the time, place, and manner standard to the Second Amendment, but did not adopt it. *Ezell I* described the time, place, and manner standard "[i]n free-speech cases" and "[i]n election-law cases" (*id*. at 707) but then made it clear that these were only analogies: "Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context." *Id*. at 709. In fact, the concurring opinion in *Ezell I* lamented that the majority did not adopt a time, place, and manner standard. *Id*. at 713 (Rovner, J., concurring in judgment). Later, in *Ezell v. of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("*Ezell II*"), that same concurring judge described the time, place, and manner standard as a "quagmire better to avoid[.]" *Id*. at 900, n. 2.

C. The Ordinance Violates Wash. Const. Art. I, § 24

1. The "Federal Floor" Requires That Intermediate Scrutiny Is the Standard of Review for Wash. Const. Art. I, § 24

a. The Second Amendment, Which Requires Intermediate Scrutiny, Forms the "Federal Floor" Beneath Which State Constitutional Protections Cannot Go – Ergo, Wash. Const. Art. I, § 24 Requires Intermediate Scrutiny at a Minimum

Jefferson County argues that the Wash. Const. art. I, § 24 test for an enactment restricting the right to bear arms is a "judicial test of reasonableness." Respondent's Brief at 25. As previously described in Appellants' Opening Brief, under the "federal floor" principle the standard is intermediate scrutiny. *Id*. at 36 & 39.

Jefferson County itself provides plenty of authority for Appellants' assertion. Every single one of the eight federal cases cited by Jefferson County hold that intermediate scrutiny, not "reasonableness" or rational review, is the test. *See* Respondent's Brief at 26.[11] Jefferson County

[11] The eight cases cited by Jefferson County in its Respondent's Brief at 26 are: *United States v. Booker*, 664 F.3d 12, 25 (1st Cir. 2011) (adopting 7th Circuit *Skoien* intermediate scrutiny); *Kachalsky v. Cty. of Winchester*, 701 F.3d 81, 96 (2d Cir. 2012) ("we conclude that intermediate scrutiny is appropriate in this case"); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) ("we will apply intermediate scrutiny here"); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) ("we conclude that intermediate scrutiny is more appropriate") (citation to quote omitted); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 693-694 (6th Cir. 2016) ("there is only one choice left: intermediate scrutiny"); *Ezell I*, 651 F.3d at 708 (requiring a "form of strong showing – a/k/a intermediate scrutiny" in a Second Amendment challenge) (citation to quoted source and internal quotation marks omitted); *United States v. Chovan*, 735 F.3d 1127, 1139-1141 (9th Cir. 2013) ("we reject rational basis review" and "we conclude that intermediate ….

provides this Court will all the authority it needs that intermediate scrutiny, not rational basis, is the standard of review under the Second Amendment.

b. The Police Power Is Not the Standard of Review for Wash. Const. art. I, § 24

Jefferson County quotes old Washington cases – all decided before the seminal 2008 *Heller* U.S. Supreme Court decision on the Second Amendment[12] – for the proposition that the police power is the standard of review for Wash. Const. art. I, § 24. *See* Respondent's Brief at 25-26. Once again due to the "federal floor" of Second Amendment intermediate scrutiny, the much lower police power standard is not the correct one. *See* Appellants' Opening Brief at 36-38.

c. A Mixture of "Reasonableness" and the Police Power Is Definitely Not the Standard or Review, and This Court Should Say So

Jefferson County argues that the standard of review for Wash. Const. art. I, § 24 is "reasonable regulation … under the police power." Respondent's Brief at 25 (citing *Jorgenson*, 179 Wn.2d at 155). Quite candidly the Supreme Court in *Jorgenson* created a new hybrid of two

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scrutiny is the proper standard to apply"); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (Supreme Court's decision in *Heller* (2008) "clearly does reject any kind of 'rational basis' or reasonableness test, *see* 554 U.S. at 628 n. 27" so intermediate scrutiny is the "more appropriate standard for review.").

[12] *See Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (setting out standards of review under the Second Amendment).

improperly low standards of review for Wash. Const. art. I, § 24 by mixing "reasonableness" and the police power, neither of which are appropriate because they are too low a standard compared the intermediate scrutiny required by the "federal floor." *See* Appellants' Opening Brief at 36-38.

Jorgenson was wrongly decided and the Supreme Court should revise its earlier ruling by considering the fully developed record in this case, Appellants' detailed *Gunwall* analysis, and quite honestly the much more comprehensive briefing presented in this case. This Court in *Kitsap Rifle* followed *Jorgenson*, which is understandable, but this Court should analyze the "federal floor" issue here and write an opinion articulating it so the Supreme Court can squarely address this issue.

d. A *Gunwall* Analysis Shows That Wash. Const. art. I, § 24 Protects the Range Training Right

If the federal floor weren't enough – and it is – a *Gunwall* analysis shows that Wash. Const. art. I, § 24 protects the range training right. Appellants' performed a comprehensive (seven-page) *Gunwall* analysis. *See* Appellants' Opening Brief at 41-48.

Jefferson County doesn't want the Court to consider that *Gunwall* analysis, asserting that it is not necessary. Respondent's Brief at 27. Obviously, Jefferson County has something to worry about from a *Gunwall* analysis.

It would be odd for this Court to not address the *Gunwall* analysis because this case is a Washington court's first chance to do so when interpreting the protections in Wash. Const. art. I, § 24 for the range training right. No previous case has done so. *Kitsap Rifle* did not; the gun range operator in that case failed to do so.[13] Appellants performed a full *Gunwall* analysis here. *See* Appellants' Opening Brief at 41-48. So this case is the first opportunity a Washington appellate court has had to undertake a *Gunwall* analysis of the range training right in Wash. Const. art. I, § 24.

(i). Historical Evidence Does Not Show That There Is No Range Training Right

Jefferson County has the burden of proving the range training right is not protected by the Second Amendment and Wash. Const. art. I, § 24. This is because Jefferson County has the burden of proving an activity is not within the historic scope of the Second Amendment and the "federal floor" this standard carries over to the state constitution. *See* Appellants' Opening Brief at 30 (burden of proof) and 36 & 39 ("federal floor").

First, it must be noted that Appellants cannot prove a negative. There were no restrictions on range shooting in the mid-1800s. Appellant cannot produce a statute reading, "Even though no one ever thought this

[13] The *Kitsap Rifle* opinion does not mention a *Gunwall* analysis; presumably, the Court would have analyzed the *Gunwall* factors if the gun range operator had briefed them.

would be necessary to say, it is hereby lawful to shoot in the evening at a gun range."

The relevant time period to be examined in a historical analysis is 1866 under the Second Amendment, the date the Fourteenth Amendment was ratified. *See Kitsap Rifle*, 1 Wn. App. 2d at 414-415. The relevant time period under Wash. Const. art. I, § 24 is 1889, the date the state constitution was amended,[14] and the geographic area to be examined is Washington state because that is the area governed by the state constitution.

Instead of focusing on the relevant 1866 or 1889 eras or the evidence from the relevant place (Washington state), Jefferson County goes back to pre-colonial times to cherry pick isolated examples like a 1746 Boston edict from the English[15] governor of the Massachusetts colony. *See* Respondent's Brief at 31-35.

Jefferson County's argument that colonial laws heavily regulated firearms is incorrect. As a law review article cited by Jefferson County concludes:

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[14] *See Gunwall*, 106 Wn.2d t 65-66 (1889 ratification of state constitution relevant date for *Gunwall* analysis).

[15] America fought a horrible war thirty years later in part to rid itself of the English laws cited by Jefferson County; if anything, oppressive colonial English laws show us what the Founders did *not* want in their new country.

> [T]he persistent assertion that "gun control legislation" made a common appearance on colonial and early national statute books, if taken alone, offers a distorted understanding of the nature and extent of gun regulation in early America. …
>
> At no time between 1607 and 1815 did the colonial or state governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic. In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens.[16]

Selectively citing isolated, oddball colonial-era ordinances is poor historical "evidence." As one of the law review articles cited by Jefferson County states, "History should be more than the stringing together of carefully selected quotations; the aggregate matters."[17] The same applies to Jefferson County's carefully selected of examples of, say, a 1746 restriction on shooting in Boston. *See* Respondent's Brief at 39.

One of biggest problems with picking and choosing isolated historical examples is that there are plenty of completely contrary examples of the narrow point sought to be proven. For example, men were

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[16] Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep and Bear Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 142 & 143 (2007) ("Churchill"). The only thing a comprehensive historical analysis of how the colonies used the "police power" over firearms ownership shows is that it was used to "disarm Catholics [and] Quakers." *Id*. at 156. Certainly this kind of thinking – and the jurisprudence that carries it out – is outdated.

[17] Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist. Rev. 567, 569 (1998) ("Bellesiles"). The mere existence of isolated historical laws is not enough because, as the law review article cited by Jefferson County explains, "It is one thing to find statute law, it is another to discovery the level of enforcement. It is certainly possible that all the laws described herein remained unfulfilled intentions." *Id*. at 570.

required to own firearms in most of the colonies.[18] This dated back to the 1285 Statute of Winchester.[19] In 1631 in Virginia, all men were legally required to bring their guns to church.[20] The range training right arguably dates back to 1620 when men were required to not only keep arms but to actively practice with them.[21] When these men were missing the mandatory range training because they were getting drunk, King Charles I "had to resort to the closure of alehouses on Sunday to keep men at their shooting practice."[22] Looking that far back in history adds nothing to modern-day jurisprudence. If anything, it would lead to requiring people to own and practice with their guns (and closing down alehouses) something Jefferson County obviously is not suggesting. Isolated, centuries-old historical examples are not only unhelpful but can lead to absurd results.[23]

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[18] Churchill at 145, n. 16 (citing authority). *See also id*. at 148 (discussing laws of several colonies requiring white Protestants to own guns but denying that right to the rest of the population).

[19] Joyce Lee Malcom, *The Right of the People to keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. Law Q. 285 (1983) ("Malcom") (citing Statute of Winchester, Edw. (1285)).

[20] Bellesiles at 578 (citations omitted).

[21] Malcom at 294 (citation omitted).

[22] *Id*. (citation omitted).

[23] The other problems with picking and choosing historical examples is that they "prove" too much, that is, they would be "authority" for principles no one would agree apply today. For example, colonial laws "den[ied] the right to own guns to potentially dangerous groups: blacks, slave and free, Indians, propertyless whites; non-Protestants or potentially unruly Protestants." Bellesiles at 576.

Yet another problem with picking isolated, one-off, outlier historical examples is that the regions of the country were very different. As the law review article cited by Jefferson County notes, "Many contemporary observers [in the colonial area] described different cultural attitudes toward firearms from one region of colonial North America to another." Bellesiles at 576. That is certainly true of New England and the western states. This is because "Each colonial government was naturally responding to singular needs and challenges, so that one could easily craft thirteen different histories." Bellesilies at 577. What made sense in Boston in 1740 (while under English rule) doesn't offer much insight to the contours of a Washington state constitutional right.

In sum, Jefferson County must prove that the range training right did not exist in 1866 nationally or in 1889 in Washington state. Where is the evidence of that in the record?

D. "Stare Decisis" Does Not Require the Application of *Kitsap Rifle* Here

Jefferson County argues that stare decisis means that this Court's decision in *Kitsap Rifle* requires a different ordinance to automatically be upheld. *See* Respondent's Brief at 5.

"[S]tare decisis will not be applied where to do so would perpetuate error …." *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459, 48 P.3d 274 (2002). For the reasons described at length in Appellants'

Opening Brief and this Reply Brief, the "reasonableness" and "police power" standard in *Jorgenson* and *Kitsap Rifle* were erroneous.

There is a second reason why stare decisis does not automatically require the Ordinance to be upheld: the Kitsap County ordinance and the Jefferson County Ordinance are materially different. *See* Appellants' Opening Brief at 22-23. *See also* CP 813-814 and *cf*. CP 92-105 *with* 606-646. Different facts mean stare decisis does not automatically apply:

> Stare decisis means no more than that the rule laid down in any particular case is applicable only to the facts in that particular case or to another cae involving identical or substantially similar facts.
> …
> [S]tare decisis does not apply … because the parties and issues are different. Stare decisis does not prevent another party from petitioning a court for consideration of how previously decided law applies to the new party's facts.

Kittitas County v. Eastern Wash. Growth Management Hearings Bd., 172 Wn.2d 144, 173, 256 P.3d 1193 (2011) (citations and internal quotation marks omitted).[24]

Stare decisis does not apply where a legal theory was not fully analyzed in the previous case:

[24] Furthermore, the level of analysis of the issues by the parties – and therefore by the courts – varies greatly between *Kitsap Rifle* and this case. Th gun range owner in *Kitsap Rifle* – in stark contrast to Appellants in this case – did not provide any historical analysis of whether the range training right was covered by the Second Amendment. *Id*. at 415. Also, the gun range owner in *Kitsap Rifle* – again in stark contrast to Appellants' in this case – did not provide a *Gunwall* analysis. Neither party nor the Court provided a historical analysis of the Second Amendment in *Jorgenson*. A historical analysis of the Second Amendment is obvious critical when it comes to determining the contours of the range training right under the state and federal constitutions.

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (citations and internal quotation marks omitted). After all:

> [P]recedents are not unalterable, and it is appropriate to hear an argument for a change in the law upon a clear showing that the established rule is incorrect and harmful[.] …
>
> [S]tability [of the law] should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.

Grisby v. Herzog, 190 Wn. App. 786, 772-773, 362 P.3d 763 (2015) (citations and internal quotations omitted).

V. CONCLUSION

For all the above reasons, the Ordinance is pre-empted and unconstitutional.

RESPECTFULLY SUBMITTED this 2nd day of July, 2019.

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CERTIFICATE OF SERVICE

I, Greg Overstreet, certify that on July 2, 2019, I emailed a copy of:

- Appellants' Reply Brief

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